IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0245
Appellee,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
GILBERT ARVIZO RAMOS,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20051699

Honorable Howard Hantman, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Kathryn A. Damstra
Tucson
Attorneys for Appellee

Robert J. Hooker, Pima County Public Defender
By Scott A. Martin
Tucson
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V Á S Q U E Z, Judge.

¶1 A jury found appellant Gilbert Arvizo Ramos guilty of possession of a deadly weapon by a prohibited possessor. On appeal, Ramos argues the trial court erred in applying another judge's prior order suppressing statements he had made to sheriff's deputies, the prosecutor engaged in prosecutorial misconduct by mischaracterizing the order to the court, and the court should have granted his motion for a mistrial or his motion for a new trial because of testimony suggesting he had invoked his right to remain silent. For the reasons discussed below, we affirm.

Facts and Procedural Background

¶2 We view the evidence presented in the light most favorable to sustaining the convictions. *State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408 (2003), *supp. op.*, 206 Ariz 153, 76 P.3d 424 (2003). One afternoon in April 2005, Ramos rented a motel room for one night. The next morning, when he had not left his room by the 11:00 a.m. check-out time, the motel manager knocked on the door but no one answered. He then used his office telephone to call the room, but no one picked up the telephone. Because the door had been locked from the inside, the manager had to use an override key to unlock the door. When he opened the door, he saw Ramos lying on the bed, with a handgun within his reach on a nearby night stand. The manager pulled the door closed, and waited to see if Ramos would leave the room. Around 1:00 p.m., the manager tried telephoning the room again and still received no answer. He went back to the room, knocked on the door, and unlocked it a second time. Ramos was still lying on the bed, and the gun was in the same position as

before. The manager closed the door and, after waiting approximately another hour, he called the Pima County Sheriff's Department.

¶3 Two deputies responded to the motel, and their sergeant arrived shortly afterwards. After they tried telephoning the room and received no response, they knocked loudly on the door. Still receiving no response, they used the manager's key to unlock the door. Ramos was lying on the bed with the gun beside him. After removing the gun from the room, one of the deputies woke Ramos by kicking the corner of the bed. The deputies questioned Ramos in the motel room before giving him the *Miranda*[1] warnings. They then arrested him and drove him to the jail.

¶4 Ramos was charged with possession of a deadly weapon by a prohibited possessor, and the state alleged he had prior felony convictions. Before trial, Ramos moved to suppress all statements he had made to the deputies, claiming they were taken in violation of *Miranda*. The judge originally assigned to the case, Judge Warner, granted Ramos's motion except for Ramos's response to the question whether anyone else was in the room. Another judge, presiding over the eventual trial, enforced his understanding of the order. The jury found Ramos guilty and the trial court sentenced him to the presumptive prison term of ten years. This appeal followed; we have jurisdiction under A.R.S. § 13-4033(A).

[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

Discussion

Suppression Order

¶5 First, Ramos makes three arguments based on a particular interpretation of Judge Warner's order suppressing his pre-*Miranda* statements, which differs from that apparently shared by the trial judge, Judge Hantman, the prosecution, and Ramos himself during the trial. At the suppression hearing, Judge Warner heard three different accounts of the questioning in the motel room. Deputy Rosalik testified that Sergeant Hancock had asked Ramos whether there *had been* anyone in the room. This was consistent with his report of the incident, written the same day, in which he had stated, "Sergeant Hancock asked [Ramos] if there had been anyone else in the room besides him. He stated there had not been anyone and he was the only occupant." Sergeant Hancock initially stated that she could not remember the exact wording of the question she had asked. She also stated that the possibility someone else had been in the room and would return raised an issue of concern for officer safety. However, on cross-examination she agreed her question had been aimed at eliciting "whether there *was* anyone else in the room then, *currently*." (Emphasis added.) And Ramos testified that he had been asked some version of the question by both Rosalik and Hancock at different times in the conversation.

¶6 Before taking the matter under advisement, Judge Warner acknowledged that Hancock could not remember what her question to Ramos had been, and asked, apparently without deciding, "is not that something you can argue at trial as to what the question really

was and what the answer really was?" Judge Warner subsequently entered an order: "suppressing all statements the defendant made to law enforcement, except his response to whether there was anyone else in the room."

¶7 Ramos now contends on appeal that the order did not permit the deputies to testify about what he had said in response to their questioning in the motel room about whether anyone had been in the room before the deputies had arrived. Specifically, he argues that the trial court abused its discretion in admitting the excluded testimony in violation of the pretrial order, the prosecutor engaged in prosecutorial misconduct by mischaracterizing the order to the trial judge, and his conviction was based on this improperly admitted evidence.

¶8 First, we consider whether Ramos forfeited these arguments by failing to object at trial. Ramos did not object to the state's characterization of the trial court's order during the trial. He nonetheless contends that his objection in his pretrial motion was sufficient to preserve the issue for appeal. "An objection is sufficiently made if it provides the judge with an opportunity to provide a remedy." *State v. Fulminante*, 193 Ariz. 485, ¶ 64, 975 P.2d 75, 93 (1999). And generally, "where a motion in limine is made and ruled upon, the objection raised in that motion is preserved for appeal, despite the absence of a specific objection at trial." *State v. Burton*, 144 Ariz. 248, 250, 697 P.2d 331, 333 (1985). However, when an order is ambiguous and appears to have been misinterpreted, a secondary question is raised concerning not the propriety of the initial ruling but whether that ruling

has, in fact, been violated. When such a perceived misinterpretation occurs, it calls for a separate, contemporaneous objection "to allow for an immediate remedy for potentially improper or unconstitutional activities." *See State v. Detrich*, 188 Ariz. 57, 64, 932 P.2d 1328, 1335 (1997). Further, a defendant's failure to object to the admission of testimony he believes is in violation of a trial court's ambiguous order may constitute invited error. *Burton*, 144 Ariz. at 252, 697 P.2d at 335. An "[a]ppellant may not invite error at trial and then assign the same as error on appeal." *Id.* And, failure to object to alleged prosecutorial misconduct waives the issue on appeal. *State v. Kemp*, 185 Ariz. 52, 62, 912 P.2d 1281, 1291 (1996).

¶9 In the present case, any ambiguity in Judge Warner's suppression order was rooted in a lack of clarity about what the deputies had actually asked Ramos before they advised him of his constitutional rights. During trial, Judge Hantman recognized that it was "not entirely clear what was suppressed."[2] From the outset of the trial, the trial court, the state, and Ramos apparently were consistent in interpreting the suppression order to permit the parties to argue "what the question really was and what the answer really was." Thus, in its opening statement, the state mentioned that there was "some discussion and Mr. Ramos indicates to Deputy Rosalik that no one else has been in that room. It's just him in the room." The court did not strike these comments and, rather than objecting, Ramos took up the issue in his own opening statement:

[2]For various reasons, the judge, the prosecutor, and Ramos's counsel were different individuals than those who had been present at the suppression hearing.

> [T]he State has indicated that the police asked [Ramos] and [he] indicated that there had been no one else in this room. . . . you may find that that statement may be a bit ambiguous or perhaps the officer's memory isn't perfect as to what was said. Perhaps he meant there's no one in the room, he looked around, there was no one there then. Maybe he meant there was no one in the room in the last hour. Maybe he meant in the last day. We don't know.

¶10 Similarly, the state elicited testimony from Detective Rosalik, without objection from Ramos, that Ramos had indicated that no one else had been in the room.[3] During cross-examination, the court called a recess because it was concerned that Ramos's line of questioning would lead to the jury hearing details of other exchanges between Ramos and the detectives, which were clearly precluded by the order. After apparently determining that further questioning in this vein would not be helpful to his case, Ramos chose to focus his cross-examination on other issues. When the state explained its understanding of the suppression order during the same recess, Ramos neither objected nor raised a claim of prosecutorial misconduct.

¶11 Thus, Ramos's failure to object to what he now argues was an incorrect interpretation deprived the trial court of an opportunity to review the suppression order and, if it had agreed with Ramos, to provide an immediate remedy.[4] Ramos has thus forfeited his

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[3]Rosalik also added to the confusion by initially appearing to respond that Ramos had not stated whether anyone else had been in the room.

[4]Arguably, under Ramos's interpretation of the order on appeal, his decision to discuss at trial the issue of what the deputy's question had been and how Ramos responded injected error into the proceedings. *State v. Burton*, 144 Ariz. 248, 252, 697 P.2d 331, 335 (1985) (appellant may not raise error he invited at trial).

three arguments related to the interpretation of the order, absent fundamental error. *State v. Cons*, 208 Ariz. 409, ¶ 2, 94 P.3d 609, 611 (App. 2004) (appellant forfeits issue not raised at trial).

¶12 To prevail, Ramos must prove error occurred and that the error was fundamental and prejudicial. *State v. Henderson*, 210 Ariz. 561, ¶¶ 23-26, 115 P.3d 601, 608 (2005). The burden of persuasion shifts to the defendant, to "discourage [him] from . . . 'reserving the "hole card" of a later appeal on [a] matter that was curable at trial, and then seek[ing] appellate reversal.'" *Id.* ¶ 19, *quoting State v. Valdez*, 160 Ariz. 9, 13-14, 770 P.2d 313, 317-18 (1989) (first alteration added).

¶13 Because the trial court's apparent interpretation of the suppression order as permitting discussion of "what the question really was and what the answer really was" was reasonable, and because neither Ramos nor the state objected at trial, we decline to interpret the order otherwise. *Cf. State v. Greene*, 162 Ariz. 431, 433, 784 P.2d 257, 259 (1989) (whether to admit or exclude evidence is within the trial court's discretion). We therefore disagree with Ramos that the trial court "fail[ed] to follow" or "effectively reconsidered" the earlier suppression ruling, and find no error, much less fundamental error, in the trial court's application of the order.[5] Because the evidence was properly admitted, Ramos was not

[5]In addition, we are not convinced that Ramos was prejudiced by the brief—and not entirely clear—references to his response to the alleged question, when there was substantial evidence indicating that Ramos had locked himself—and the gun—inside the motel room. *See State v. Thomas*, 130 Ariz. 432, 436, 636 P.2d 1214, 1218 (1981) (no prejudice where substantial evidence to support verdict and error did not contribute significantly to verdict).

convicted "based on evidence previously ruled inadmissible."[6] And, the state's consistent characterization of the order did not amount to prosecutorial misconduct. *See State v. Atwood*, 171 Ariz. 576, 606, 832 P.2d 593, 623 (1992), *disapproved on other grounds by State v. Nordstrom*, 200 Ariz. 229, ¶ 25, 25 P.3d 717, 729 (2001); *accord State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998) (for a conviction to be reversed on the grounds of prosecutorial misconduct there must first have been misconduct); *see also Pool v. Superior Court*, 139 Ariz. 98, 102, 677 P.2d 261, 265 (1984) (whether prosecutor's action is misconduct depends on "the circumstances of the particular case").

Motion for mistrial/motion for a new trial

¶14 Next, Ramos argues the trial court erred in denying his motions for a mistrial and for a new trial based on testimony from one of the deputies implying that Ramos had invoked his Fifth Amendment right to silence. A mistrial is "the most dramatic remedy for trial error" and we will not disturb a trial court's decision to deny a mistrial absent an abuse of discretion. *State v. Maximo*, 170 Ariz. 94, 98-99, 821 P.2d 1379, 1383-84 (App. 1991). We likewise review a trial court's denial of a new trial for an abuse of discretion. *State v. Hoskins*, 199 Ariz. 127, ¶ 52, 14 P.3d 997, 1012 (2000), *supp. op.*, 204 Ariz. 572, 65 P.3d 953 (2003). Thus, if "it appears that substantial justice has been done" we will not reverse

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[6]Ramos does not allege that it would have been error per se to admit evidence that he had said there had been no one else in the room. Although we therefore do not address this issue, we note that "[v]oluntary responses to 'questions necessary to secure [police officers'] own safety . . .' may be admitted in court despite the lack of *Miranda* warnings." *In re Roy L.*, 197 Ariz. 441, ¶ 15, 4 P.3d 984, 989 (App. 2000), *quoting New York v. Quarles*, 467 U.S. 649, 659 (1984).

the court's judgment on "whether or not improper argument in a criminal case has influenced the verdict." *State v. Merryman*, 79 Ariz. 73, 74, 75, 283 P.2d 239, 241 (1955).

¶15 A defendant's due process rights are violated when a witness testifies that the defendant invoked his right to remain silent. *State v. Gilfillan*, 196 Ariz. 396, ¶ 36, 998 P.2d 1069, 1079 (App. 2000). However, it is within the trial court's discretion to deny a mistrial or a new trial even when such a violation occurs unless there is a "reasonable probability" that such testimony "materially affected the outcome of the trial." *See id.* ¶ 38. In *Gilfillan*, a police officer responded to a prosecutor's question by stating that when the defendant "requested the assistance of a lawyer . . . I concluded all of the questioning." *Id.* ¶ 37. In that case, Division One of this court concluded that such a brief reference, offered to explain why the defendant's interview with the officer had ended, did not warrant the reversal of the trial court's denial of a mistrial. *Id.* ¶ 38.

¶16 Here, the deputy's statement that Ramos had "refused to answer questions" was just as brief, and was introduced to explain why he had not questioned Ramos about the gun.

> Q. Isn't it true that at no time did this person that you saw lying on the bed admit to having any knowledge of any gun?
>
> A. Correct.
>
> Q. In fact, you never even asked him about any gun; is that correct?
>
> A. That is correct. He refused to answer questions.

Further, the statement was not elicited by the state, but was invited by Ramos's counsel who repeatedly asked the deputy about his questioning of Ramos regarding the gun. *See Burton*, 144 Ariz. at 252, 697 P.2d at 335 (defendant may not invite error at trial then use such error as grounds for reversal on appeal). And, also apparently unlike *Gilfillan*, the trial court immediately struck the deputy's statement. We therefore presume that the jury did not consider it in reaching its verdict. *State v. Newell*, 212 Ariz. 389, ¶ 69, 132 P.3d 833, 847 (2006) (jury is presumed to follow instructions). Thus, the deputy's statement could not have influenced the verdict, and the court did not abuse its discretion in denying Ramos's motions.

Disposition

¶17 For the reasons stated above, we affirm.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

_____
PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge